INNAB SALIL & ORS v. VERVE SUITES MONT KIARA MANAGEMENT CORPORATION

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
ZABARIAH MOHD YUSOF JCA
NOR BEE ARIFFIN JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1425-07-2018]
2 DECEMBER 2019

LAND LAW: *Strata title – Management corporation – Enactment of House Rules prohibiting use of residential units for business including short term rental – Validity of House Rules – Whether violated s. 70(5) of Strata Management Act 2013 ('SMA') – Whether additional by-law within meaning of s. 70(2) of SMA – Whether management corporation empowered to make additional by-laws for regulating common property in strata scheme – Whether House Rules agreed upon by majority residents – Whether short term rental fell within realm of 'lease' or dealing in s. 70(5)(a) of SMA – Whether caught by prohibition under s. 70(5)(a) of SMA read together with s. 5 of National Land Code*

WORDS & PHRASES: *'short term rentals' – Meaning of – Whether arrangements of temporary nature – Whether 'dealings' as envisaged under National Land Code ('NLC') – Whether exempted from limitations and prohibitions under NLC – Whether provides security of tenure – Strata Management Act 2013, s. 70(5)*

The plaintiff was a management corporation incorporated pursuant to the Strata Titles Act 1985 ('STA') to maintain and manage a residential development known as 'Verve Suites'. The first defendant ('D1') was a Swedish national and a tenant in a unit of the Verve Suites and owned 999.900 shares in the second defendant ('D2'), a company incorporated in Malaysia which operated rental in Verve Suites and was managed by D1. D2 had rented units from the third to seventh defendants, parcel owners in the Verve Suites, and leased out the units for short term rental and long term rental. Pursuant to a circular by the Commissioner of Building Kuala Lumpur ('COBKL') instructing all joint management corporation ('JMC') or the management corporation ('MC') to address issues relating to short term rentals in strata buildings in and around Kuala Lumpur under the COBKL, the plaintiff held an extraordinary general meeting ('EGM') on 25 March 2017. The plaintiff proposed the enactment of House Rule No 3, which was passed by an overwhelming number of residents present and voting to prohibit the use of the residential units in the Verve Suites for business including short term rental. It was the plaintiff's stand that House Rule No 3 was passed solely to regulate, control, manage and administer the use and enjoyment of the residential units and the common property of Verve Suites in matters relating to the safety, security and use of the individual units and to protect the common property. The plaintiff informed the residents of

Verve Suites about the implementation of House Rule No 3. However, the defendants continued with their business of renting out their units on short term basis to tourists and transient visitors with impunity and in total defiance and wilful breach of House Rule No 3. As a result, the plaintiff issued a fine of RM200 per day against the residents who failed to abide to the House Rule No 3. The defendants (D3, D7, D8, D9, D11, D15, D18 and D19) filed an action before the Strata Management Tribunal ('Tribunal'), challenging the validity of House Rule No 3 particularly on the provision that prohibited the short term rentals on the ground that the provision was in violation of s. 70(5) of the Strata Management Act 2013 ('SMA'). The Tribunal dismissed the claim, but allowed D7's application to set aside the appointment of Nithianandan, the chairman of the plaintiff, from being a member of the plaintiff. Pursuant to s. 70(7) of the SMA, the plaintiff commenced a writ action ('Suit 461') against the defendants, the parcel owners in Verve Suites, for the enforcement of House Rule No 3. Subsequently, D4 registered a licence with DBKL for the provision of short term rental. DBKL confirmed that there could not be any prohibition for short term rental to be carried out in a property held under a commercial category. During the case management of Suit 461, the High Court Judge ('HCJ') ruled that the matter was suitable for disposal pursuant to O. 33 r. 2 of the Rules of Court 2012 ('ROC'). Therefore, with the consensus of the parties, the plaintiff filed an application under O. 33 r. 2 of the ROC, together with an affidavit-in-support affirmed by Nithianandan, to determine the question on law as to whether, based on the pleadings filed by the parties, the plaintiff's enforcement of House Rule No 3 had violated s. 70(5) of the SMA. The HCJ allowed the plaintiff's claim and entered judgment against the defendants. However, the HCJ struck down the part of the House Rule No 3 which imposed a daily fine of RM200 for each day the infringement continued against the defendants on ground that it violated s. 70(2) of the SMA. Hence, this appeal in respect of the validity House Rule No 3, *vis-à-vis* s. 70(5) of the SMA and cross-appeal by the plaintiff against the decision pertaining to the imposition of the daily fine. The defendants also raised the preliminary points: (i) on the suitability of the cause of matter to be decided under O. 33 r. 2 of the ROC; (ii) on the alleged lack of authority of the deponent of the affidavit-in-support of the application under O. 33 r. 2 of the ROC; and (iii) that the House Rules were not registered with COBKL.

Held (dismissing defendants' appeal and plaintiff's cross appeal)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court.

(1) The short-term rentals created problems which extended to cloning of access cards as a serious breach of safety and security in community living. The dispute was essentially only limited to the validity of the use of the Verve Suites for businesses of short-term rentals by the parcel owners. There were no factual disputes in the case that warranted it to be adjudicated *via viva voce* evidence. The defendants

had never denied carrying on the activities of short-term rentals by the use of their respective units in Verve Suites against House Rule No 3, despite having claimed to have discontinued the activities. Therefore, the business of short-term rentals was very much a live issue and was not discontinued. (paras 90 & 91)

(2) The defendants, having agreed to participate in the determination and after having proposed further questions for the court on the same, could not take the reverse positioning in the memorandum of appeal, namely, that the matter was not suitable for disposal pursuant to O. 33 r. 2 of the ROC. In addition, the same defendants had applied before the Tribunal for a similar ruling as to whether House Rule No. 3 was contrary to s. 70(5) of the SMA and the Tribunal had ruled against all the defendants. Further, during the hearing, the defendant had never objected to the application on the ground that there were disputed facts or that the question of law posed for determination was unsuitable or insufficient to dispose the matters in disputes. The court was, therefore, led to believe that both parties agreed to dispose the case by reference to the procedure under O. 33 r. 2 of the ROC as invited by the court during the case management. (paras 96, 97 & 99)

(3) Given that the two EGMs held on 10 December 2016 and 25 March 2017 were valid, the deponent, Nithianandan, who chaired the same, could not be impugned for want of authority to affirm the affidavit in support. It was also not disputed that at the time when O. 33 r. 2 application was filed, the deponent of the plaintiff's affidavit in support had already been made the chairman of the plaintiff. In such capacity, he had the authority to affirm the affidavit on behalf of the plaintiff. (para 103)

(4) The issue that the House Rules were allegedly not registered with the COBKL and thus was not valid, was never pleaded in the statement of defence and was never part of the agreed issues to be tried. In addition, the issue was never raised at all at the hearing of the application in the court below and therefore, ought not to be ventilated in this appeal. In any event, the House Rules had been registered with the COBKL pursuant to s. 70(6) of the SMA. (para 105)

(5) The STA and SMA were promulgated by Parliament to provide for the maintenance and management of buildings and common property of multi-storey buildings and sub-divided land in a proper and an efficient manner to benefit and contribute to the success of the strata development. The STA was amended and harmonised with the NLC. The SMA had carved out all the provisions regarding the management of the sub-divided building under the STA and placed it purely under the governance of the Strata Management (Maintenance and Management) Regulations 2015 ('the Regulations'). Under s. 70(2) of the SMA read together with regs. 5 and 28 of the Regulations, the MC

A is empowered by special resolution to make additional by-laws not inconsistent with the statutorily prescribed by-laws for regulating the control, management, administration, use and enjoyment of the building or land and common property in the strata scheme. House Rule No 3 was passed by a special resolution by an overwhelming
B majority of the residents by way of an EGM, which was convened pursuant to a directive by COBKL. The prohibition in the House Rules No 3 was strictly confined to short-term rentals but it was never meant to apply to genuine agreements for rental between the parcel owners as landlord and tenants, which was explained in the deeming
C provision of the short-term rentals activities falling within the prohibition as stated therein. (paras 114-117)

(6) The legislative intent of the SMA as can be discerned from the preamble of the Act is to advance interest in communal living within a strata scheme. Therefore, it would defeat the spirit and purpose of
D the SMA for the proprietors such as the defendants to use their residential units in the form of business enterprise such as short-term rentals. The majorities' wishes had to be taken heed of, hence there could never be any violation of s. 70(5) when House Rule No 3 was adopted. (para 119)

E **(7)** Short-term rentals are arrangements which are of temporary nature, where there is no relationship of landlord and tenant. Therefore, such arrangement could not be termed as 'dealings' envisaged under the NLC and should not be subjected to the limitations and prohibitions under the NLC. There is no definition for the word 'dealing' in the
F SMA and the parties were in consensus in referring to the definition as stipulated under s. 5 of the NLC to mean any transaction in respect to alienated land affected under the powers conferred by Division IV. The logical and reasonable interpretation of s. 70(5) of the SMA would be to prohibit and restrict any dealings which are registered. This was
G further fortified by the provision in s. 34(1)(a) of the STA which effectively means a strata lot owner may subject his unit to the dealings in Division IV of the NLC. Hence, House Rule No 3 was not caught by the prohibition under s. 70(5)(a) of the SMA read together with s. 5 of the NLC and therefore, House Rule No 3 was not in violation of the SMA. (paras 127 & 129-131)

H **(8)** The owner of the parcel unit in Verve Suites, in granting the short-term rentals or stay, never intended to grant a legal or equitable interest to the 'guests' in the short-term arrangement which by its very nature were merely transient lodgers for a specified consideration.
I There was no security of tenure in the sense that he could be evicted if he overstayed. Therefore, going by the meaning of the word 'dealing' and 'lease' in s. 70(5)(a) of the SMA and that short term rentals are in the nature of temporary occupation, House Rule No 3

did not come within the realm of 'lease' or dealing as found in s. 70(5)(a) of the SMA. The SMA only seeks to prohibit the creation of by-laws which restricts the alienation of land and the right of assignment which are inherent characters of freehold ownership. (paras 138 & 141)

(9) As House Rule No 3 had not violated s. 70(5)(a) of the SMA, the HCJ did not err in making the findings that House Rule No 3 was an additional by-law within the meaning of s. 70(2), valid and enforceable and not in any way contrary to s. 70(5) of the SMA. Neither could it be said to be oppressive and unreasonable. Therefore, the question, as posed by the parties, was answered in the negative. The defendants' contention that according to the land title of Verve Suites, it was a commercial building and was not a residential building, hence, the defendants' short-term rental business was not illegal and did not contravene any existing law, was misconceived as the by-laws, which are statutorily enacted in s. 70(2) in the SMA read together with regs. 5 and 28 of the Regulations, are applicable to both residential and commercial units under the SMA. (paras 142, 159 & 161)

(10) Section 70(2)(i) of the SMA allows the imposition of a fine of RM200 for any breach of by-law. For the plaintiff to impose a daily fine for each continuing breach, there must be an express provision stating as such. However, the section never provides for nor envisages an imposition of fine of RM200 for each day of continued infringement. Hence, the MC was not authorised by s. 70(2)(i) of the SMA to impose a fine of RM200 for each day the infringement continues. (paras 163-166)

Case(s) referred to:

Amber Court Management Corporation & Ors v. Hong Gan Gui & Anor [2016] 2 CLJ 751 CA ***(refd)***

Byrne v. The Owners of Ceresa River Apartments Strata Plan [2017] QASCA 104 ***(refd)***

Caradon District Council v. Paton [2001] 33 HLR 34 ***(refd)***

Eastens v. Owners Corporation SP 1825 [2017] NSWCATCD 25 ***(refd)***

Gin Poh Holdings Sdn Bhd v. Government of the State of Penang & Ors [2018] 4 CLJ 1 FC ***(refd)***

Hamlena Pty Ltd v. Sydney Endoscopy Centre Pty Ltd [1990] 5 BPR 11 ***(refd)***

Joint Management Body Cheras Sentral v. Tribunal Pengurusan Strata & Ors [2018] 1 LNS 72 HC ***(dist)***

Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626 CA ***(refd)***

Marchant v. Charters [1977] 3 All ER 918 ***(refd)***

O'Connors (Senior) & Ors v. The Proprietors, Strata Plan No 51 [2017] UKPC 45 ***(refd)***

Pembinaan Lagenda Unggul Sdn Bhd v. Geohan Sdn Bhd & Another Appeal [2018] 1 LNS 172 CA ***(refd)***

RS Architect Planners & Engineers v. Ocean Front Pte [1996] 1 SLR 113 ***(refd)***

Street v. Mountford [1985] 1 AC ***(refd)***

Swan v. Uecker and Another [2016] 50 VR 74 ***(refd)***

A *Tjia Swan Nio v. Ng Nyuk Moi & Ors [1992] 4 CLJ 2200; [1992] 3 CLJ (Rep) 713 HC* ***(dist)***

Tra Mining (Malaysia) Sdn Bhd v. Thein Hong Teck & Ors And Another Appeal [2012] 3 CLJ 692 CA ***(dist)***

Legislation referred to:

B Federal Constitution, art. 13

Hotels (Federal Territory of Kuala Lumpur) Act 2003, s. 2

Interpretation Acts 1948 and 1967, s. 17A

National Land Code, ss. 5, 205, 206, 207, 208, 209, 210, 211, 212, 213(1), (2), (3), 221(2), 224(a), 241, 282, 292, 304, 316, 317, 318

Rules of Court 2012, O. 33 r. 2

C Rules of the High Court 1980, O. 14A

Strata Management Act 2013, ss. 3, 34(3), 59(1), (2)(g), (j), 70(2)(i), (3)(a), (5)(a), (6), (7)

Strata Management (Maintenance and Management) Regulations 2015, regs. 5, 7(1), (2), 9(1), 28, Third Schedule regs. 7(1), 9(1)

Strata Titles Act 1985, ss. 34(1)(a), 39(1)

D Conveyancing (Strata Titles) Act 1961 [NSW], s. 13(3)

Strata Schemes Management Act 2015 [Aus], s. 139(2)

For the appellant - Manpal Singh Sachdev, Loke Wei Lun & Yap Teck Hui; M/s Manjit Singh Sachdev, Mohammad Radzi & Partners

For the respondent - Shahabudin Shaik Alaudin, Rosnida Che Ibrahim, Siti Murazwani Zulkeflee; M/s Shahabudin & Rozima

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[Editor's note: For the High Court judgment, please see Verve Suites Mont' Kiara Management Corporation v. Innab Salil & Ors [2018] 1 LNS 2318 (affirmed).]

Reported by S Barathi

JUDGMENT

F

Zabariah Mohd Yusof JCA:

[1] The appellants/defendants appeal against that part of the decision of the learned High Court Judge dated 6 June 2018 which allowed the respondent's/plaintiff's claim pursuant to an application under O. 33 r. 2 of
G the Rules of Court 2012 (ROC) against the appellants/defendants. In doing so, the learned High Court Judge dismissed the appellants'/defendants' counterclaim. The defendants, however did not appeal against the dismissal of the counterclaim.

[2] Apart from allowing the respondent's/plaintiff's claim, the learned
H High Court Judge had struck down that part of the House Rule No. 3 of the respondent's/plaintiff's which imposed a daily fine of RM200 for each day the infringement continues against the defendants, on grounds that it violates s. 70(2) of the Strata Management Act 2013 (SMA 2013). The respondent/ plaintiff cross-appeal against this part of the decision of the learned High
I Court Judge.

[3] In this judgment, the parties shall be referred to as they were, in the court below in that the respondent as the plaintiff and the appellants as the defendants. The defendants shall be referred to, in accordance to their

reference in the intitulement given as in the court below, namely the first defendant shall be referred to as "D1" and the second defendant shall be referred to as "D2" and so forth.

[4] We have perused the appeal records and considered the oral and written submissions of both parties. After having given the appeal our utmost thoughts and consideration, we came to a unanimous decision and dismissed the appeal of the defendants and the cross-appeal of the plaintiff. We hereby give our reasons which shall be the judgment of the court.

Background

The Parties

[5] The plaintiff is a management corporation (MC) incorporated pursuant to the Strata Titles Act 1985 (STA 1985) to maintain and manage a residential development known as "Verve Suites" located at No 8, Jalan Kiara 5, Mont Kiara, 50480 Kuala Lumpur.

[6] D1 is a Swedish national and a tenant in a unit of the Verve Suites and owns 999.900 shares in D2 thereby making D1 virtually the sole owner having full control of D2.

[7] D2 is a company incorporated in Malaysia which operates short term rental in Verve Suites and is managed by D1. D2 had rented units from D3-D7 at the Verve Suites and lease out the said units for short term rental and long term rental.

[8] D3-D7 are parcel owners in the Verve Suites and lease their respective units to D2.

The Undisputed Facts Leading To The Dispute

[9] On 18 November 2015, the Commissioner of Building Kuala Lumpur (COBKL) issued a directive, *vide* "Pekeliling COBKL 2015/16" instructing all joint management corporation (JMC) or the management corporation (MC) to address issues relating to short term rentals in strata buildings in and around Kuala Lumpur under the COBKL. For clarity, we reproduced the relevant parts of the "Pekeliling COBKL 2015/06" which reads:

> Pengerusi 18.11.2015
>
> Badan Pengurusan Bersama (JMB/
> Perbadanan Pengurusan (MC)
> Wilayah Persekutuan Kuala Lumpur.
>
> Tuan/Puan,
>
> **Penggunaan Rumah Kediaman Berstrata Sebagai Rumah Penginapan Pelancong**
>
> …

2. Bersama-sama ini dilampirkan surat makluman bertarikh 15 September 2015 oleh Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan (KPKT) berkenaan mekanisme kawalan yang boleh dikenakan bagi mengawal rumah kediaman berstrata digunakan sebagai rumah penginapan pelancong atau homestay.

3. Cadangan yang dikemukakan oleh pihak KPKT adalah agar semua pihak pengurusan dapat menambahbaik Undang-Undang Kecil di bawah Jadual Ketiga Peraturan-Peraturan Pengurusan Strata (Penyengaraan dan Pengurusan) 2015 sekiranya terdapat keperluan. *Penambahbaikan Undang-Undang Kecil boleh dilaksanakan dengan memasukkan peruntukan yang tidak membenarkan unit kediaman berstrata digunakan sebagai kediaman pelancong atau homestay tanpa kebenaran pihak pengurusan.* Namun demikian, cadangan penambahbaikan Undang-Undang kecil tersebut perlu dibuat selaras dengan peruntukan di bawah seksyen 32 dan seksyen 70 Akta Pengurusan Strata 2013 (Akta 757).

4. Kerjasama tuan/puan amat diharapkan demi kesejahteraan bersama komuniti strata … (emphasis added)

[10] Pursuant to the aforesaid circular by the COBKL, the plaintiff held an Extraordinary General Meeting (EGM) on 25 March 2017, wherein the plaintiff proposed the enactment of House Rule No. 3. The aforesaid House Rule was passed by an overwhelming number of residents present and voting, to prohibit the use of the residential units in the Verve Suites for business, including short term rental. Only four parcel owners voted against the proposal whilst the remaining 96 parcel owners voted for the same. It is the plaintiff's stand that House Rule No. 3 was passed solely to regulate, control, manage and administer the use and enjoyment of the residential units and the common property of Verve Suites in matters relating to the safety, security and use of the individual units and to protect the common property. The main focus was to prohibit all forms of short term rental activities involving the use of the residential units as advertised on various internet platforms for tourists and vacationers seeking for temporary accommodation and to put a stop to the commercial activity of short term rental by unit owners or occupiers which is contrary to laws. It was never meant to prohibit genuine tenancy agreements between the owners and tenants.

[11] The plaintiff informed the residents of the Verve Suites about the implementation of House Rule No. 3 *vide* letters dated 20 April 2017 and 21 August 2017. These, however went unheeded and the defendants continue with their business of renting out their units on short term basis to tourists and transient visitors with impunity and in total defiance and wilful breach of the House Rule No. 3.

[12] As a result, the plaintiff, *vide* invoices dated 6 July 2017 and 4 August 2017, issued a fine of RM200 per day against those residents who failed to abide to the House Rule No. 3.

[13] The defendants (D3, D7, D8, D9, D11, D15, D18, D19), dissatisfied with the prohibition of short term rentals by the plaintiff, filed an action on 30 July 2017 before the Strata Management Tribunal, challenging the validity of the House Rule No. 3 particularly on the provision that prohibits the short term rentals on the ground that the said provision is in violation of s. 70(5) of the SMA 2013. A B

[14] The plaintiff after receiving the notice from the Strata Management Tribunal of the defendants' action, filed for an injunction order against the defendants, which they successfully obtained on 31 October 2017 against the same in respect of their short term rental activities.

[15] On 2 November 2017, the Strata Management Tribunal dismissed D3, D7, D8, D9, D11, D15, D18, D 19's claims against the plaintiff (pp. 718-725 of CCB Jilid 4). C

[16] On 17 November 2017, the Strata Management Tribunal allowed D7's application to set aside Nithianandan a/l Rajasingham's appointment from being a member of the plaintiff. This can be seen from para (c) of the Strata Management Tribunal's Award dated 17 November 2017 at p. 725 of CCB Jilid 4. D

[17] Pursuant to s. 70(7) of the SMA 2013, the plaintiff commenced a writ action against the defendants who are parcel owners in Verve Suites for the enforcement of House Rule No. 3, in the High Court under Suit WA-22NCVC-461-09-2017. The defendants objected stating that the House Rule No. 3 violates s. 70(5)(a) of the SMA 2013. E

[18] On 8 September 2017, 19 September 2017, 31 October 2017 and 4 December 2017, the High Court granted interim injunction for the plaintiff. F

[19] On 20 February 2018, D4 registered a license with DBKL for the provision of short term rental. DBKL confirmed in their letter dated 16 March 2018 that there cannot be any prohibition for short term rental to be carried out in a property which is held under a commercial category. G

[20] On 25 March 2018, during the case management of Suit WA-22NCVC-461-09/2017, the learned High Court Judge ruled that the matter is suitable for disposal pursuant to O. 33 r. 2 of ROC 2012. With consensus of parties, on 9 April 2018 the plaintiff filed an application under O. 33 r. 2 together with an affidavit in support affirmed by Nithianandan a/l Rajasingham, the Chairman to the plaintiff to determine the question of law arising from the cause and/or matter in the present claim namely: H

> Whether based on the pleadings filed by the parties herein the plaintiff's enforcement of the House Rule No. 3 had violated s. 70(5) of the Strata Management Act 2013 (the 2013 Act). I

[21] The application under O. 33 r. 2 of the ROC is only against D1, D2, D4, D6, D7, D8, D11, D14, D15 and D18. The remaining defendants had agreed and entered into settlement agreements with the plaintiff on the cause of action against them. Therefore, the present reference to the defendants in the present appeal is only with regards to D1, D2, D4, D6, D7, D8, D11, D14, D15 and D18 only.

[22] At the end of the determination of the application under O. 33 r. 2 of the ROC, the learned High Court Judge allowed the plaintiff's claims and entered judgment against the defendants under the application under O. 33 r. 2 of the ROC. Aggrieved by the decision of the learned High Court Judge, the defendants filed their notice of appeal to the Court of Appeal which is the appeal before us.

[23] The learned High Court Judge in allowing the plaintiff's claim under O. 33 r. 2 ROC, struck down that part of House Rule No. 3 which imposes a daily fine of RM200 against the defendants, for each day infringement continues, as it violates s. 70(2) of SMA 2013. The plaintiff was dissatisfied with this part of the order of the learned High Court Judge and appealed against the same. This forms the subject matter of the cross-appeal by the plaintiff before us.

The Dispute

[24] The dispute herein is in relation to the validity of the additional by-law enacted by the plaintiff in the form of House Rule No. 3 so as to control over the alleged unlawful and illegal use of the parcel units in a strata development known as "the Verve Suites" by parcel owners such as the defendants for business in the form of short term rentals.

[25] It is stated in the grounds of decision by the learned High Court Judge that parties are in consensus that the case is suitable for disposal by way of O. 33 r. 2 ROC as the crux of the dispute in the action is in respect of the validity of House Rule No. 3 *vis-à-vis* s. 70(5) of the SMA 2013 (para. 15 of vol. 1 CCB).

The Findings By The Learned High Court Judge

Whether The Plaintiff's Enforcement Of The House Rule No. 3 Had Violated s. 70(5) Of The SMA 2013

[26] The much-disputed House Rule No. 3 which was enacted by the plaintiff reads:

> 3.0 OCCUPANCY
>
> 3.1 Approved use of the Units
>
> The unit shall be used only for the purpose of service suites and shall not be used for business or any other purpose (Illegal or otherwise) which may be detrimental to the credibility of Verve Suites Mont Kiara.

The use of any unit for short-term rentals is prohibited. For the purpose of these rules, a short-term rentals agreement shall be deemed unless proven otherwise if they fall within the following:

i. Any stay for which a booking was made through services/ applications/websites etc. such Airbnb, booking.com, agoda.com, klsuites.com and other similar services;

ii. Any stay for which a signed and stamped tenancy agreement has not been filed with VSMO and tenants registered and issued with access cards;

iii. Any unit rented out with a tenancy agreement that permits the tenant from subleasing the property.

Any breach of the above shall attract a penalty RM200 for each day the infringement continues. The Management reserves the rights to deactivate the access cards and barred the unit from facilities booking.

Any infringement found shall be deemed to be at minimum an overnight stay thus deemed as 2 days unless proven otherwise.

A unit owner shall be liable for the penalties incurred by his tenant if his tenant carries such activities as prohibited under these rules and shall be deemed notified of such charges if an email or sms has been sent to the address/number maintained in VSMO register.

All fines collected under this section shall be used for the effort to combat the prohibited practice of short-term rentals.

[27] The alleged contravention by House Rule No. 3 is in relation to s. 70(5)(a) of the SMA 2013, which provides that:

(5) No additional by-law shall be capable of operating-

(a) To prohibit or restrict the transfer, lease or charge of **or any other dealing with any parcel of a sub divided building or land;** and

(b) To destroy or modify any easement expressly or impliedly created by or under the Strata Titles Act 1985.

(emphasis added)

[28] The defendants assert that the effect of House Rule No. 3 was to prohibit the use of any parcel unit for short term rental. Such House Rule infringed s. 70(5)(a) of the SMA 2013, as short term rental falls within the ambit of "any other dealing with any parcel of a subdivided building of land" of the said section.

[29] The word "dealing" has not been defined in the SMA 2013 but the National Land Code (NLC) defines it as:

... any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the provisions or any previous land law, but does include any caveat of prohibitory order.

[30] The learned High Court Judge referred to Division IV of the NLC which captioned "Alienated lands: dealings" which covers the whole scope of dealings like transfers of land, leases, charges, sale of lands, grants or easements and caveats" (ss. 205-399 NLC).

[31] The defendants argued that short term rental falls within the meaning of "a tenancy exempt from registration" under the NLC and as such House Rule No. 3 which prohibits any short term rentals has infringed s. 70(5)(a) SMA 2013. However, the learned High Court Judge was not persuaded by such argument by the defendants.

[32] The learned High Court Judge observed that House Rule No. 3 prohibits short term rental activities which consist of the following:

(i) any stay where booking of the units is made online;

(ii) any stay where no tenancy agreement has been filed with the management office of the condominium and tenants are registered and issued with access cards; and

(iii) any unit rented out with tenancy agreement that permits the tenant to further sublease the unit.

[33] The learned High Court Judge held that short term rental guests especially those who have booked the units online are merely transient lodgers. The learned High Court Judge referred to the Airbnb terms of service which describes the booking by the guest as "a licensee".

[34] The defendants' argument that the short term rentals should be considered as "a dealing" within the meaning of the NLC is illogical and absurd as short term guests are akin to hotel guests. The learned High Court Judge held that it cannot be construed that every booking of a parcel unit is a "dealing", within the meaning of NLC and neither can it be construed that these bookings are tenancies exempt from registration, as there is no relationship of landlord and tenant in short term rentals.

[35] The defendants' "house guests" who have booked their units online, are, in law, mere licensee who have been allowed to enter the licensor's (where the unit owner is referred to as "host") property for consideration; they are not trespassers, neither do they have any proprietary right pass to them. As there is no landlord and tenant relationship between them, there are no merits in the claim by the defendants that these short term rentals are tenancies exempt from registration pursuant to s. 213 of the NLC.

[36] The short term rental activities that the defendants were, and continue to be engaged in, do not fall within the meaning of "any other dealing" of s. 70(5)(a) of the SMA 2013.

[37] The SMA 2013 is a social piece of legislation which provides a framework to allow the community of residents to control, manage, administer, use and enjoy the building or land as prescribed in the SMA 2013 and the by-laws as prescribed by the regulations made thereunder.

[38] Section 3 of the SMA 2013 provides that the SMA 2013 shall be read and construed with the STA 1985 and the legislation made thereunder.

[39] "The Management Corporation" is defined in the SMA 2013 as "the management corporation" which comes into existence under the Strata Titles Act 1985. Under s. 39(1) of the STA 1985, "a management corporation consisting of all the parcel proprietors …" and this means that the MC of Verve Suites comprises of all the parcel proprietors of the condominium.

[40] The duties and powers of the MC is provided for under s. 59 of the SMA 2013. In respect of by-laws, s. 70(2) of the SMA 2013 empowers the MC by special resolution to make additional by-laws for safety and security measures and amongst others, for behaviour.

[41] Section 70(3) of the SMA 2013 provides that the additional by-laws made under sub-s. (2) shall bind the MC and the proprietors, and any chargee, lessee, tenant or occupier of a parcel to the same extent as if the additional by-laws:

(a) had been signed and sealed by the MC and each proprietor, and each such chargee, lessee, tenant or occupier respectively; and

(b) contained mutual covenants to observe, comply and perform all the provision of these additional by-laws.

[42] The House Rule No. 3 was voted and approved by the majority of the residents despite the defendants' objection. The plaintiff's pleadings and affidavits listed out numerous incidents where the defendants' house guest had misused the common facilities and caused nuisance to the residents which compromised the safety and security measures, which had been put in place by the cloning of the access cards (p. 658 of CCB Jilid 4).

[43] The House Rules are in fact an extension of the negative and positive covenants in the Deed of Mutual Covenants (DMC) wherein the defendants as the owner and/or the purchasers had signed and had full knowledge of all the prohibition contained therein, including conducting business through the use of the unit in Verve Suites. The learned High Court Judge held that the House Rule No. 3 is consistent and in conformity with the terms of the DMC.

[44] The learned High Court Judge found cogent evidence that the defendants have breached the House Rule No. 3 by engaging D1 and D2 to run the short term rental business by renting out their units to D1 and D2. It is the learned High Court Judge's findings that the tenancies are a mere camouflage of the defendants' actual objective of using their units for the

business of short term rental by appointing D1 and D2 as their agent in advertising these units to the public at large in various social media which had effectively turned Verve Suites into a commercial hotel and imposing GST on these house guests.

[45] The House Rule is also in consonant to reg. 9(1) of the Strata Management (Maintenance and Management) Regulations 2015, which provides that a proprietor shall not use his parcel for any purpose, illegal or otherwise, which may be injurious to the reputation of the development area.

[46] The defendants by renting their units, through D1 and D2, to tourists and transients have compromised the safety and security measures that the MC had put in place for the benefits of all residents of the Verve Suites. This is because third parties and strangers would be coming to stay at the parcel units and they would be given access to the common facilities and areas within the Verve Suites. The residents of Verve Suites are served with a variety of amenities which are not available in an average apartment. Verve Suites is a high rise luxury development of apartment houses in four blocks on 5.87 acres of freehold land situated in Mont Kiara. The four blocks of Verve Suites house 933 units consist of four towers. Sky lounges are located at the peak of each tower and residents can enjoy a spectacular penthouse view of the four sky lounges. The development is the first of its kind in that Block D features a Sky Beach ever built in apartment development in Malaysia. The 24-hour security features include card access control at all main entry points. By allowing the short term rentals, it would be accessible to third parties and strangers who are non-residents and security would certainly be compromised as they would be given cloned access cards to the common property which should only be accessible to unit owners. The defendants have collectively and/or individually caused their respective units in Verve Suites to be turned into hotel rooms with large numbers of guests coming to check in and check out with flurry of activities interfering with the security, quiet enjoyment and overall well-being of the residents in the Verve Suites.

[47] By unlawfully converting these units for commercial use through D1 and D2, for the benefit of a few unit owners who only have their own monetary and mercenary benefit in mind is contrary to the House Rules and the DMC. It is not an activity sanctioned by the SMA 2013 and in breach of the DMC and of the by-laws, especially House Rule No. 3.

[48] House Rule No. 3 is an additional by-law within the meaning of s. 70(2), valid and enforceable and not in any way contrary to s. 70(5) of SMA 2013. It is to preserve the safety and security of all residents of the condominium and to protect the common property. It is of paramount importance to all of the residents, particularly to those who are living in close proximity to one another.

[49] The scheme of the SMA 2013 provides for the mechanism which is designed to regulate the limited relationship between the proprietors *inter se* and the MC and it was never intended to regulate or supervise any business enterprise such as short term rentals activities. The by-laws and the House Rules which are enacted are devised to deal with, *inter alia* the problems of community living and to provide for standards of conduct essential thereto to be adhered to, by all concern.

[50] The learned High Court Judge held that House Rule No. 3 is valid and enforceable and not in any way contrary to s. 70(5)(a) of the same. Neither is the by-law oppressive or unreasonable as it serves to preserve the safety and security of all the residents of the condominium and to protect the common property. This is a matter of importance to all residents who live in a strata development as they live in close proximity to one another. Neither can it be said that the House Rule runs foul of art. 13 of the Federal Constitution because it does not in any way take away the defendants' proprietary rights and interest over the property as they continue to enjoy unimpeded and undisturbed ownership of their property.

[51] The learned High Court Judge answered the question posed in the application, in the negative, namely that the plaintiff's enforcement of House Rule No. 3 does not violate s. 70(5)(a) of the SMA 2013.

Findings By The Learned High Court Judge On The Penalty Of RM200 Per Day For Each Breach

[52] The House Rule No. 3 imposed RM200 per day penalty for each day the infringement continues and that the fines collected shall be used for the effort to combat the prohibited practice of short term rental. Regulation 7(2) of the Strata Management (Maintenance and Management) Regulation 2015 provides that all fines imposed shall be a debt due to MC and upon payment shall be deposited into the maintenance account.

[53] The RM200 per day penalty imposed for each day the infringement continues is in violation of s. 70(2)(i) which only allows for a fine of RM200 for each breach of any by-law. Not by day.

Findings By The Learned High Court Judge On The Plaintiff's Deponent Authority In Affirming The Affidavit In Support Of The Application Under O. 33 r. 2 ROC

[54] No merit in this issue raised by the defendant in respect of the plaintiff's deponent's authority as the deponent had deposed to the fact that he is the current Chairman of the MC and clearly authorised to depose the affidavit in support of the application under O. 33 r. 2 of the ROC.

Findings By The Learned High Court Judge On Other Issues Raised By Defendants

[55] There is no issue of non-registration of the House Rule No. 3, as this was never raised in defence and it is trite law that parties are bound by their pleadings.

[56] The learned High Court Judge allowed the plaintiff's claim and dismissed the defendants' counterclaim with costs. The learned High Court Judge however struck down part of the House Rule No. 3 of the plaintiff which imposed a daily fine of RM200 on the defendants.

The Submission By The Defendants

[57] House Rule No. 3 is invalid as it infringes s. 70(5) of the SMA 2013 as it restricts the proprietor's usage of the individual's units and therefore the enforcement is illegal. The said Act merely empowers the plaintiff as the MC to manage the limited common property and does not extend to the right of the plaintiff to restrict or dictate as to the respective parcel owner's inherent right in dealing with their own property including but not limited to selling, renting or leasing their parcels and that House Rules should not be oppressive and unreasonable such that they will adversely affect the individual proprietor's rights. Therefore, the learned High Court Judge erred in law for failing to hold that House Rule No. 3 is an illegal by-law.

[58] The defendants submit that the word "dealings" in s. 70(5)(a) of the SMA 2013 takes its definition from s. 5 of the NLC which means any transaction with respect to alienated land effected under Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order. Dealings under Division IV of the NLC include tenancies. The NLC recognised tenancies less than three years and these are exempt from registration (s. 213 (1) and (2) NLC). The defendants further submit that the short term rental of the parcel unit is actually a form of tenancy exempt from registration as the period is less than three years.

[59] It is implied that the landlord of a subdivided building or land has the absolute right to transfer, lease or charge of, or carry out any other dealing which includes using their own unit to provide short term rentals. Hence the provision of the House Rule which prohibits the owners of the parcel units, namely the defendants, to rent out their own service apartment unit for short term rental is unconstitutional because the said prohibition has deprived the defendants of their right of usage and enjoyment of their own property.

[60] The guidelines issued by the COBKL are merely a suggestion and it is not a law that binds the defendants and the plaintiff. The guidelines issued cannot contravene any law, namely s. 70(5)(a) of the SMA 2013.

[61] The learned High Court Judge erred when Her Ladyship held that the short term rental guests of the defendants are transient lodgers who are licensees and hence short term rental is not tenancy, without a full trial to determine the validity of the facts. Her Ladyship also erred when she determined the short term rental guests are licensees merely based on the term of "a licence" described on the Airbnb terms of service without a full trial as the short term of service or agreement alone does not accurately reflect the real intention of the parties.

[62] The defendants submit that exclusive possession is transferred by the owners of the parcel units in Verve Suites to D2 as tenants of these parcel units. The exclusive possession of those units is then transferred to the guests of the short term rental. The guests of the short term rental should be considered as tenants, which means that short term rental is a form of tenancy. The defendants referred to the decision of the Supreme Court of Victoria in *Swan v. Uecker and Another* [2016] 50 VR 74 where the court held that short term rental under the Airbnb Agreement constitutes a lease and not licence.

[63] It is the contention of the defendants that there is no requirement for the minimum period for tenancy as stated in the NLC as the NLC recognises tenancy on a weekly basis (s. 224(a) NLC). It is the right conferred by the NLC to the landowner to let or sublet their own unit and the period of the tenancy is subject to the agreement between the landlord and the tenants as long as the term of tenancy is less than three years.

[64] The learned High Court Judge also erred when she considered that short term rental guests are akin to hotel guests without considering the definition of "hotel" as prescribed under s. 2 of the Hotels (Federal Territory of Kuala Lumpur) Act 2003. The defendants are merely renting out their service apartment units at Verve Suites for short term tenancy, and hence it does not fall within the parameters of the definition of the conduct of hotel business. The defendants referred to *Swan v. Uecker and Another* (*supra*) where the Supreme Court of Australia held at para. 46 that:

> I am of the view that the hotel room analogy is not appropriate in the present circumstances. The evidence and the provisions of the Airbnb Agreement, in my view, that although the occupancy granted to the Airbnb guests was, in this case, for a relatively short time, the quality of that occupancy is not akin to that of a "lodger" or an "hotel guest".

There is no proof that the defendants are in actual fact running a hotel operation.

[65] The learned High Court Judge erred in law and fact in deciding that the short term rental activities of the defendants had severely disrupted the peace and quiet of Verve Suites with the alleged facts that:

(i) the defendants' house guests had misused the common facilities;

(ii) caused a nuisance to residents; and

(iii) compromised the safety and security measures by using the cloned access cards,

merely by basing on the pleadings filed by parties. These are facts which have yet to be adduced and proven by way of *viva voce* evidence/documentary evidence.

[66] The learned High Court Judge also erred in deciding that the defendants had breached the House Rule No. 3 and subsequently allowing the plaintiff to impose a fine against the defendants solely based on pleadings filed by the parties.

There is no proof as to how the defendants had breached the House Rule No. 3 and no documentary evidence produced by the plaintiff in court to prove their allegation of a breach of the said House Rule by the defendants.

[67] The plaintiff contended that the preliminary issues framed by the defendants are inaccurate/defective as facts pleaded need to be adjudicated. The facts are complex and heavily disputed. Verve Suites is a commercial building and is not a residential building.

[68] On the cross-appeal, the defendants submit that the learned High Court Judge had erred in holding that the defendants had breached the House Rule No. 3 and further allowing the plaintiff to impose a fine of RM200 for the alleged breach of the said House Rule No. 3 by the failure to determine the fact by way of a full trial.

[69] The provision of the House Rule No. 3 which states as follows:

> …
>
> The use of any unit for short-term rentals is prohibited. For the purpose of these rules, a short-term rentals agreement **shall be deemed unless proven** otherwise if they fall within the following:
>
> iv. Any stay for which a booking was made through services/ applications/websites etc. such Airbnb, booking.com, agoda.com, klsuites.com and other similar services;
>
> v. Any stay for which a signed and stamped tenancy agreement has not been filed with VSMO and tenants registered and issued with access cards;
>
> vi. Any unit rented out with a tenancy agreement that permits the tenant from subleasing the property.

appears to operate as a strict liability offence where the plaintiff has put the burden onto the defendants to prove the negative that they are not providing short term rental. The burden should lie with the plaintiff to prove that the defendants had breached the said House Rule.

[70] In any event, s. 70(2) of the SMA 2013 only allows the plaintiff to impose fines not exceeding RM200 to residents who breached the by-law.

The Submission By The Plaintiff

[71] House Rule No. 3 was passed by special resolution by a majority of residents at an EGM on 25 March 2017. Only four parcel owners voted against, while the remaining voted for the House Rule No. 3 to be passed.

[72] The EGM was convened pursuant to a directive issued by the COBKL on 18 November 2015 for such House Rule to be emplaced to address issues relating to short term rentals in strata buildings in and around Kuala Lumpur under COB.

[73] There are no disputes as to the facts. The dispute is limited to the validity of the use of the units in the Verve Suits to carry out the business of short term rentals.

[74] The defendants never denied carrying out activities of short term rentals by the use of their respective units in Verve Suites against House Rule No. 3. D7 deposed he had applied and obtained what he claimed a license to do short term rentals from the authority.

[75] The same defendant had applied to the Strata Management Tribunal for similar ruling as to whether House Rule No. 3 is contrary to s. 70(5)(a) of SMA 2013 and the Strata Management Tribunal ruled against all the defendants on the issue.

[76] D4, D5 and D7 applied for judicial review of the decision of the Strata Management Tribunal and this was dismissed by the High Court. There was no appeal on the said High Court decision.

[77] On the objection by the defendants that this issue was not suitable to be disposed of *via* O. 33 r. 2 ROC, there has been no intimation by the defendants that they objected to the hearing of the preliminary questions *via* O. 33 r. 2 ROC application.

[78] The defendants raised the issue that the House Rule was not registered with the COBKL. The plaintiff submitted that this issue was never pleaded and was never part of the issues to be tried.

[79] The plaintiff submits that s. 3 of the SMA 2013 provides for the SMA 2013 to be read and construed with the STA 1985. The SMA 2013 is a social piece of legislation to encourage strata living, hence both of the Acts must be interpreted in a purposive manner within s. 17A of the Interpretation Acts 1948 and 1967 to promote the intention of Parliament.

[80] Under the SMA 2013, once a by-law is enacted, it binds the MC and the proprietors, and any chargee, lessee, tenant and occupier as provided in s. 70(3). The by-laws form a statutory contract between the person or entities aforesaid in s. 70(3)(a). The net effect is explained in s. 70(7) where the MC or proprietor shall be entitled to apply for reliefs to enforce the performance of or restrain the breach of the restrictive by-laws.

[81] Section 70(5)(a) of SMA 2013 is intended to prohibit and restrict registered dealings and not short stay intended in the business of short term rentals that the plaintiff seek to exclude by passing House Rule No. 3. The word "dealing" present in s. 70(5)(a) of the SMA 2013 refers to registered

dealing. This is supported by the provision in s. 34(1)(a) of the STA 1985 which provides that a proprietor of a parcel unit, has the powers conferred by the NLC in relation to his land and this effectively means a strata lot owner may subject his unit to the dealings in Division IV of the NLC.

For this reason, House Rule No. 3 had not violated the SMA 2013 in that, what the law intended to prohibit and restrict are not found in the House Rule.

[82] Section 221(2) of the NLC provides that every lease granted shall be for a term exceeding three years. The reference to the word "lease" in s. 70(5)(a) of SMA 2013 must be taken in relation to a lease under the NLC. As lease under the NLC is only possible for a term exceeding three years, the word "lease" in s. 70(5)(a) of the SMA 2013 could not have meant to bear reference to short term renting by the defendants which by nature is for short term occupancy.

[83] Therefore, short term renting is not a lease but rather a bare licence for a permissive occupancy. The licensor in such agreement retains the right to oust the licensee and there is no legal or equitable interest vested in the guests of short term rental by nature of the lease.

Given the aforesaid, the question of law ought to be answered in the negative.

[84] On the cross-appeal which relates to the frequency at which fines may be imposed, the plaintiff is empowered to impose a fine in such manner as the MC deems fit, such a daily fine for a continuing contravention of the by-law. In any event, this matter is within the statutory powers of the plaintiff in s. 70(2) of the SMA 2013 read together with reg. 7(1) of the Third Schedule to Regulation 2015.

Regulation 7(1) provides for a simple resolution at a general meeting to impose the fine and the applicable amount but in the present case the House Rule with regards as to fine was made by way of special resolution, which is over and above the requirement in law for the imposition of fines.

[85] The plaintiff was of the view that the power to impose fine also includes the power to decide the frequency with which they can be levied so long as the parcel owners approve it. The power to impose fine includes the power to assess fines and the frequency at which such fines can be imposed at a deterrent level for the benefit in the strata living without contravening the enabling Act, namely SMA 2013.

[86] The plaintiff submits that the deterrent aspect at which the daily fine is directed ought to prevail failing which the enforcement of House Rule No. 3 makes no legal nor economic sense. If a parcel owner in the short term rental business rents out for two nights or fourth nightly, the plaintiff can only fine the parcel owner once in respect of each contravention of the House Rule. The plaintiff considers a fine of merely RM200 would be treated by the offenders as costs of doing business and they would simply factor in the

amount of fine in the rent and would have no problem paying the fine. As such, the imposition of daily fine for each day the breach continues would act as an effective deterrent against such parcel owners, making the enterprise of short term rentals as being expensive and uneconomical. If not, parcel owners would not mind contravening the House Rule and just pay the fine which is pittance compared to the attractive income derived from such short term rental business. Hence the plaintiff submits that their cross-appeal ought to be allowed.

Our Findings

Preliminary Issues

[87] The pivotal issue in this appeal before us, is in respect of the validity of House Rule No. 3 *vis-a-vis* s. 70(5) of SMA 2013. However, before we go into the crucial issue, we need to address some preliminary points raised by the defendants in the present appeal, namely:

(a) Suitability of the cause of matter to be decided under O. 33 r. 2 ROC;

(b) The alleged lack of authority of the deponent of the affidavit in support of the application under O. 33 r. 2 of the ROC;

(c) House Rules not registered with the COBKL.

Suitability Of The Cause Of Matter To Be Decided Under O. 33 r. 2 ROC

[88] It is the contention of the plaintiff that the preliminary issues framed by the defendants are inaccurate/defective as the facts pleaded need to be adjudicated *via* a full trial. The facts are complex and heavily disputed. Hence the case is not suited to be disposed of *via* O. 33 r. 2 of the ROC.

[89] The defendants submitted that the learned High Court Judge erred in law and fact in deciding that the short term rental activities of the defendants had severely disrupted the peace and quiet of Verve Suites. This finding was premised on the alleged facts based on affidavit evidence and the facts in the pleadings that the defendants' house guests had misused the common facilities and caused a nuisance to residents and compromised the safety and security measures by using the cloned access cards. These facts have yet to be adduced and proven by way of *viva voce* evidence/documentary evidence.

[90] We find that this contention is misconceived as the learned High Court Judge had considered the affidavit evidence and the pleadings to find that the short term rental creates problem which extends to cloning of access cards as a serious breach of safety and security in community living. The learned High Court Judge had examined the evidence and concluded there is cogent proof that the defendants are complicit in breaching the House Rules in running the business from the units in Verve Suites with tenancies agreement entered between them which was merely to camouflage the real commercial enterprise in the business. The learned High Court Judge had considered the

plaintiff's pleadings and affidavits, which listed out numerous incidents via reports by the residents where the defendants' house guest had misused the common facilities and caused nuisance to the residents which compromised the safety and security measures, which had been put in place by the cloning of the access cards (p. 658 of CCB Jilid 4).

[91] Therefore, the dispute as stated in the issues agreed to be tried, thus far, is essentially only limited to the validity of the use of the Verve Suites for businesses of short term rentals by the parcel owners. We do not see any factual disputes in the case that warrants to be adjudicated via *viva voce* evidence, as submitted by the defendants. In addition, the defendants have never denied carrying on the activities of short term rentals by the use of their respective units in Verve Suites against the House Rule No. 3, despite having claimed to have discontinued the activities (paras. 14 and 15 at pp. 218-219 of CCB). This averment appeared to be contradictory to the deposition by D7 when he averred in his affidavit that he had applied for and obtained what he claimed to be a license from the authority, to conduct the short term rentals with the authority. It is evident from the background facts as stated by the defendants in their written submission in paras. 4.2 to 4.5 that the defendants are in the business of short term rentals at the Verve Suites in which D2 rents from D3-D7 their parcel units for business. Given the aforesaid, there is indeed evidence to show that the business of short term rentals is very much a live issue and not discontinued as contended (p. 217 para. 10 CCB Jilid 2) by the defendants.

[92] Hence, the contention by the defendants that there are factual disputes and that the learned High Court Judge failed to consider the disputes on the facts, are without merits. The case of *Tra Mining (Malaysia) Sdn Bhd v. Thein Hong Teck & Ors And Another Appeal* [2012] 3 CLJ 692 referred to, by the defendants in support of the defendants' contention, involved serious dispute as to facts in a partnership which led to the winding up of the partnership, hence the application to determine the case under O. 14A of the Rules of the High Court 1980 was rightly decided as being unsuitable. That is not the situation in our present case.

[93] The question of law as proposed in the application under O. 33 r. 2 ROC relates to the same issue as stated in the first issue agreed to be tried between the parties. The rest of the issues are subsidiary, which are closely related to the question of law. This can be discerned from pp. 508-528 of the CCB Jilid 3. On this we agreed with the submission by the plaintiff in that:

(i) Issue no. 4, namely whether the defendants in allowing D1 and D2 to use the parcel units for short term rentals had breached House Rule No. 3 could effectively be disposed of, once the question of law is determined. The necessity to answer or determine the question of law is further amplified in issue no. 11 to be tried, where parties seek for a ruling from the court as to whether the plaintiff in the enforcement of House Rule No. 3 had acted *ultra vires* the SMA 2013;

(ii) The aforesaid position is repeated again in issue no. 13 to be tried, where it is the enforcement of the House Rule No. 3 had caused and deprived the defendants the use, access and enjoyment of their respective units in the Verve Suites;

(iii) In the event the court holds the House Rule No. 3 had violated the law then, the defendants' conduct in allowing their units to be used for the business of short term rentals could no longer be impugned;

(iv) Similarly, the issue of whether the remaining defendants acted in complicit with D1 and D2 in the challenge against the House Rule No. 3 in issue no. 5 to be tried, falls to be decided if the outcome of the question of law, is resolved in favour of the defendants, the complicit is no longer in issue;

(v) With regards to the penalty imposed and the indemnity demanded of the defendants in issues no. 6 and 8 to be tried, these are issues conjoined with the interpretation of the questions of law in s. 70(5) of SMA 2013 as the damages and indemnity recoverable in s. 70(5)(a) is consequent upon the question of law is resolved; and

(vi) Given the aforesaid, the remaining issues as stated in the issues to be tried in the court below are merely consequential upon the court rendering the interpretation on the question of law that is pivotal in finally disposing the plaintiff's claim and the counter-claim of the defendants.

[94] In the event the question of law is decided in favour of the defendants, the prohibited acts by the defendants are no longer an issue and consequentially the defendants are free to engage their units for businesses of short terms rentals.

[95] It is for this reason that it was agreed by consensus by all parties with the determination of the question of law. From the appeal records, the defendants had even suggested further questions for the court to consider which effectively refers to the same (refer to pp. 226-227 para. 9 of the CCB Jilid 2).

[96] Therefore, having agreed to participate in the determination and after having proposed further questions for the court on the same, the defendants could not take the reverse position in the memorandum of appeal, namely that the matter is not suitable for disposal pursuant to O. 33 r. 2 ROC (pp. 7-11 at paras. 2-9 CCB Jilid 1).

[97] In addition, the same defendants had applied before the Strata Management Tribunal for a similar ruling as to whether House Rule No. 3 is contrary to s. 70(5) of the SMA 2013 and the Strata Management Tribunal had ruled against all the defendants.

[98] Some of the defendants (D4, D5 and D7) had also filed for judicial review of the decision of the Strata Management Tribunal which was dismissed by the High Court. Parties did not appeal on the decision of the High Court and as such D4, D5 and D7 cannot take a different stand which means that their appeal herein does not have a leg to stand on.

[99] Further, the defendants during the hearing of the application below had never objected to the application on the ground that there are disputed facts or that the question of law posed for determination is unsuitable or insufficient to dispose of the matters in dispute. If that had been intimated to the court below, at least the learned High Court Judge was given the opportunity to rule on the suitability of the disposal via determination of question of law. However, that was not so, as the defendants proceeded with the hearing of the determination on the questions of law without any objection. The defendants cannot blow hot and cold. Premised on the aforesaid, the court was led to believe that both parties agreed to dispose of the case by reference to the procedure under O. 33 r. 2 ROC as invited by the court during case management.

[100] Given the aforesaid, we found that the learned High Court Judge did not err when she stated in her grounds that parties by consensus agreed that this case is suitable to be disposed by way of O. 33 r. 2 as the crux of the matter is the validity of the House Rule No. 3 *vis-a-vis* s. 70(5) of the SMA 2013. The main defence of the defendants in the present case is the issue of the *ultra vires* of the House Rule No. 3 which was alleged to be in violation of s. 70(5)(a) of the SMA 2013, which essentially involves the determination of question of law as agreed, which will ultimately dispose the action with substantial saving of time and costs. There are therefore no merits in the argument of the defendants that this case is not suitable to be disposed of *via* determination of questions of law under O. 33 r. 2 of the ROC, as there are no disputes as to the material facts.

Whether The Deponent Of The Affidavit In Support Of The Application Has Authority To Depose The Affidavit On Behalf Of The Plaintiff

[101] The defendants contend that the deponent, Nithianandan a/l Rajasingham who had affirmed the affidavit in support of the application under O. 33 r. 2 ROC, has no authority to depose the same on the ground that he no longer was qualified as a Chairman of the plaintiff. The Strata Management Tribunal on 17 November 2017 *vide* Award No: TPS/W-1322-5-7 at para. (b) had impugned his appointment as Chairman of the plaintiff (p. 725 CCB Jilid 4).

[102] In this regard, it is to be noted that the same award by the Strata Management Tribunal had also dismissed the claim by D7 to impugn the by-law passed at the EGM of 25 March 2017 which was chaired by the deponent. Likewise, para. (c) of the same award of the Strata Management Tribunal had also dismissed the claim by D7 to declare the AGM on 10 December 2016 and 25 March 2017 as null and void.

[103] Given that the two EGMs held on 10 December 2016 and 25 March 2017 are valid, the deponent who had chaired the same could not be impugned now for want of authority to affirm the affidavit in support. It is also not disputed that at the time when O. 33 r. 2 application was filed, the deponent of the plaintiff's affidavit in support had already been made the Chairman of the plaintiff. In such capacity he has the authority to affirm the affidavit on behalf of the plaintiff.

[104] The authority referred to by the defendants in *Joint Management Body Cheras Sentral v. Tribunal Pengurusan Strata & Ors* [2018] 1 LNS 72 to support their contention that the deponent of the plaintiff's affidavit lacked the authority, does not bear the same facts as in our present case. The deponent in *Joint Management Body Cheras Sentral* (*supra*) was no longer the Chairman of the JMB at the time when the leave application was filed and the court therein rightly set aside the leave obtained. Unlike the facts in our case. Hence, the learned High Court Judge did not err when Her Ladyship found that there are no merits raised by the defendants with regards to the alleged lack of authority of the deponent to the plaintiff's affidavit in support of the application.

House Rules Not Registered With The COBKL

[105] On the issue that the House Rules are allegedly not registered with the COBKL and hence it is not valid; this was never pleaded in the statement of defence and was never part of the agreed issues to be tried. In addition, the issue was never raised at all at the hearing of the application in the court below and therefore ought not be ventilated at this appeal.

Be that as it may, the House Rules had been registered with the COBKL pursuant to s. 70(6) of SMA 2013.

[106] In any event, the question of law as directed to be determined, once decided would dispose the concern of the defendants on the issue of registration of the same with COBKL, as once the by-law is declared as violating s. 70(5)(a) of the SMA 2013, the need for registration would no longer be an issue.

The Question Of Law To Be Determined

[107] It is the plaintiff's contention that essentially the intention of the House Rule No 3. is to prohibit the use of residential units in the Verve Suites for short term rentals for tourists and vacationers seeking temporary accommodations. The prohibition in the House Rule is confined to short-term rentals but not genuine agreement for rental between parcel owners and tenants. This, according to the plaintiff, is sufficiently explained in the deeming provision of the short term rentals activities falling within the prohibition stated therein.

A The Power Of The Plaintiff To Enact By-Laws

[108] Regulation 9(1) of Strata Management Regulation 2015 prohibits a proprietor from using his parcel for any purposes illegal or otherwise which may be injurious to the reputation of the development and detrimental to the strata scheme. This is applicable to all strata schemes, be it residential or
B otherwise.

[109] Of paramount importance is s. 70(5)(a) of the SMA 2013 which states:

> (5) No additional by-law shall be capable of operating-
>
> (c) To prohibit or restrict the transfer, lease or charge of or any
C other dealing with any parcel of a sub divided building or land; and
>
> (d) To destroy or modify any easement expressly or impliedly created by or under the Strata Titles Act 1985.

D **[110]** It is the contention of the defendants that the words "or any other dealing" include short term rental which is a form of tenancy exempt from registration as the period is less than three years. The defendants referred us to s. 5, Division IV of the NLC which consists of ss. 205-213. One of the types of dealings under Division IV of the NLC is tenancies for a term not exceeding three years. It is submitted by the defendants that it is the right of
E the landlord of a subdivided building or land, to transfer, lease or charge of, or carry out any other dealing which includes using their own unit to provide short term rentals. Therefore, the defendants concluded that House Rule No. 3 which prohibits short term rentals of the parcel units contravenes s. 70(5) of the SMA 2013 and art. 13 of the Federal Constitution.

F **[111]** In determining the proposed question, the legislative intent of the statutory provisions would have to be looked into, with particular reference to the legislative background of the SMA 2013 and the various provisions within the Act.

G **[112]** Section 3 of the SMA 2013 provides that it is to be read and construed with the STA 1985. The STA 1985 was the first piece of legislation enacted and passed to govern subdivision of building into unit parcels and the subsequent issuance of the strata titles in Peninsular Malaysia. Over a period of time this particular legislation was proved to be inadequate to govern the
H management aspect of the subdivided buildings. This led to the enactment of the Buildings and Common Property (Maintenance) Act 2007 (BCPA 2007) which was aimed to specifically address the issue of maintenance and management of multi-storey buildings and their common property by developers followed by joint management buildings.

I

[113] The co-existence of the STA 1985 and BCPA 2007 led to further confusion of the law in relation to the management and maintenance of subdivided buildings, which necessitated an overhaul and review of the laws with regard to strata development. This led to the passing by Parliament of the SMA 2013 on first June 2013. A

[114] These legislations (STA 1985 and SMA 2013), were promulgated by Parliament to provide for the maintenance and management of buildings and common property of multi-storey buildings and sub-divided land in a proper and an efficient manner to benefit and contribute to the success of the strata development. The COBKL is appointed for the purpose of administering and carrying out the provisions of the SMA 2013. B C

[115] The STA 1985 was amended and harmonised with the NLC. The SMA 2013 has carved out all the provisions regarding management of sub-divided building under the STA 1985 and placed it purely under the governance of the Strata Management (Maintenance and Management) Regulations 2015 which duly came into force on 2 June 2015. D

[116] Under s. 70(2) of the SMA 2013 read together with regs. 5 and 28 of the Strata Management (Maintenance and Management) Regulations 2015, the MC is empowered by special resolution to make additional by-laws not inconsistent with the statutorily prescribed by-laws for regulating the control, management, administration, use and enjoyment of the building or land and common property in the strata scheme. The power given to the MC in making by-laws is not exhaustive and does not limit the matters for which by-laws can be made and how it is to be implemented. E

[117] It is undisputed that House Rule No. 3 was passed by a special resolution by an overwhelming majority of the residents by way of an EGM on 25 March 2017. The EGM was convened pursuant to a directive by COBKL, to prohibit the use of the residential units in Verve Suites advertised for short term rentals on various internet platforms for tourists and vacationers seeking for temporary accommodations. The prohibition in the House Rule No. 3 is strictly confined to short terms rentals but it never was meant to apply to genuine agreements for rental between the parcel owners as landlord and tenants, which is explained in the deeming provision of the short term rentals activities falling within the prohibition as stated therein. F G

[118] In reading and interpreting s. 70(5) of the SMA 2013, a purposive approach is required, as such interpretation would support the purpose behind the legislation of s. 70(5) specifically and the SMA 2013 generally. H

[119] The legislative intent of the SMA 2013 as can be discerned from the preamble of the Act is to advance interest in communal living within a strata scheme. Therefore, it would defeat the spirit and purpose of the SMA 2013 for the proprietors such as the defendants to use their residential units in the form of business enterprise such as short term rentals. The majority of the I

A residents have voted against the same. The majorities' wish has to be taken heed of, hence there could never be any violation of s. 70(5) when House Rule No. 3 was adopted.

[120] The duties and powers of the plaintiff are found in s. 59(1) and (2) of SMA 2013. The powers of the plaintiff as the MC which are relevant to our B present interpretation can be found under s. 59(2)(g) and (j) of the same which provides as follows:

> (g) subject to subsection 70(2), to make additional by-laws for the proper maintenance and management of the subdivided buildings or lands and the common property;
>
> C
>
> …
>
> (j) to do all things reasonably necessary for the performance of its duties under this Act and for the enforcement of the by-laws.

[121] The residential characteristics in the strata scheme is expressed in D terms of the minimum requirements of the statutory by-laws in s. 70(2) and as detailed in the Third Schedule of the Strata Management (Maintenance and Management) Regulations 2015 which prescribes the type of activities that may or may not be carried out at all in strata lots generally, eg, cleaning windows, keeping animals, duty to maintain lot, prevention of fire and other E hazards adopted by the House Rules.

[122] Given the nature of strata living such as aforesaid, the SMA 2013 and the Strata Management (Maintenance and Management) Regulations 2015 made thereunder, are essential laws for strata buildings, after the handing over by the developer once the parcel units are sold. The developer no longer F had control over the parcel units on the use of the parcel lots save and except for the restrictive covenants inserted in the sales and purchase agreement backed by the deed of mutual covenant (DMC). The SMA 2013 envisages a gradual transfer of the obligation to manage and maintain the strata scheme to the MC as prescribed in Part V, Chapter 2 with which the mutual G covenants is then replaced with the statutory contract between the parcel owners and the MC, which can be found in s. 70 of the SMA 2013.

[123] Following thereto, to complement the users' restriction, the developer may facilitate tabling a motion at the first annual general meeting of the MC to adopt and pass the DMC as its by-laws. The MC has wide powers to enact H by-laws subject to the limitations found in s. 70(5)(a) of the SMA 2013 which is now the subject matter of the dispute.

[124] The by-laws, once enacted, statutorily binds the MC and the proprietors, chargee, lessee, tenant and occupier as provided by s. 70(3). Such by-laws form a statutory contract between the person(s) or entities I aforesaid in s. 70(3)(a). Pursuant to s. 70(7), the MC or proprietor shall be entitled to apply for reliefs in enforcing the performance of or restrain the breach of the restrictive by-laws.

[125] Therefore, in answering the question of law as proposed by the parties, there is no issue that the MC has the right to enact House Rule No. 3.

[126] Case laws have established the powers of MC to enact by-laws with special reference to the SMA 2013. This court in *Amber Court Management Corporation v. Hong Gan Gui & Anor* [2016] 2 CLJ 751 explained the extent and limit of the powers of the MC granted by Parliament under the SMA 2013. Similarly *RS Architect Planners & Engineers v. Ocean Front Pte* [1996] 1 SLR 113 is a Singapore case which underlines powers enjoyed by MC, which has to be determined by reference to the express provisions by the enabling statute.

Whether The Word "Dealing" In s. 70(5) Of The Act Applies To Short Term Rentals

[127] Short term rentals are arrangements which are of such a temporary nature where there is no relationship of landlord and tenant. Hence, it is our view that such arrangement cannot be termed as "dealings" as envisaged under the NLC and should not be subjected to the limitations and prohibitions under the NLC.

[128] Any other interpretation, would create an absurd situation and it would also not be in accord to the intention of Parliament in enacting the SMA 2013 as this would create a disharmonious situation between the owners of parcel units who wish to enter into a commercial business venture of short term rentals of their units with the duties of the MC in having to advance a larger interest of the other owners of the units who opposed to the same within the same strata scheme. Such interpretation would also be against the concept of strata living where owners have joint ownership and peaceful and quiet enjoyment to the common property and facilities of the strata scheme without any outside interference from third parties or strangers.

[129] The SMA 2013 has no definition of the word "dealing", and parties are in consensus in referring to the definition as stipulated under s. 5 of the NLC to mean any transaction with respect to alienated land affected under the powers conferred by Division IV, which explains the entire provisions of dealings in the alienated land such as Transfers in s. 214; Leases and Tenancies in s. 221; Creation of Charges in s. 241; Easements in s. 282; and Registration of Dealings and the manner thereof in ss. 292 and 304 of the NLC.

[130] The logical and reasonable interpretation of s. 70(5) of the SMA 2013 would be to prohibit and restrict any dealings which are registered. Short term rentals at which the House Rule No. 3 is directed at, would certainly not be caught by the intended prohibition both under the SMA 2013 and the NLC. This is further fortified by the provision in s. 34(1)(a) of the Strata

A Titles Act 1985 which provides that a proprietor shall have in relation to his parcel the powers conferred by the NLC on a proprietor in relation to his land, which effectively mean a strata lot owner may subject his unit to the dealings in Division IV of the NLC.

B Therefore the learned High Court Judge did not err when Her Ladyship held that House Rule No. 3 does not prohibit registered dealings. Hence, House Rule No. 3 is not caught by the prohibition under s. 70(5)(a) of the SMA 2013 read together with s. 5 of the NLC. The definition in the NLC refers to registered dealings such as can be found in ss. 205-399 of the NLC.

C **[131]** In the aforesaid circumstances, House Rule No. 3 is not in violation of the SMA 2013. The learned High Court Judge correctly held that the short term rental which the House Rule No. 3 seek to prohibit are specific and not general when it specifies as follows:

(a) Booking for the unit is made online as opposed to genuine tenancy
D agreement;

(b) Any stay where no tenancy agreement is lodged with the office and the tenants for the stay are not registered and issued access cards; and

(c) Any unit rented out with tenancy agreement that permits tenant to further permits subletting.
E

The number of days of the stay is irrelevant, what matter is the nature of the stay.

[132] It was also specially enacted in accordance with the Circular (Pekeliling) issued by the COBKL which allowed for the improvement to the
F existing by-laws by inserting a prohibition of residential strata units being used as places for homestay, transient visitors or vacationers without the express approval of the MC. Essentially, it prohibits the commercial use of the residential parcel units.

G **[133]** Section 70(5)(a) also states "no additional by-law shall be capable of operating to prohibit or restrict the … lease … of a subdivided building or land …"

Section 221(2) of the NLC provides that every lease granted is for a term exceeding three years, therefore the reference to the word "lease" in
H s. 70(5)(a) of Act 757 must be taken to mean a lease under the NLC.

The practice by the defendants of the parcel units for short term rentals which are less than three years, can never be construed as a "lease" and as such, the prohibition in s. 70(5) of the SMA 2013 has no application to House Rule No. 3.

I Therefore, the learned High Court Judge did not err when Her Ladyship found that it is not a lease but a bare license for a permissive occupancy as opposed to a registrable right or interest under the NLC which carries a degree of permanency in the duration of the stay.

[134] Consistent with the findings of the learned High Court Judge with regard to the nature of the stay as a mere license, the learned High Court Judge found the argument by the defendants that short term rentals should be considered as "dealing" within the meaning of the NLC, as absurd, as short term rental guests can be equated to hotel guests. We are of the view that there is no flaw in such findings by the learned High Court Judge because, if every booking for short term stay is regarded as "dealing" then such bookings are in fact tenancies exempt from registration within s. 213 of the NLC, with the undesirable consequences of a hotel as the "landlord" and its guests as "tenants". Such construction is absurd when the proviso of s. 213(3) of the NLC is considered. The proviso in the section provides that for tenancy exempt from registration to be recognised, it must be endorsed on the register of document of title pursuant to Chapter 7 Part 18 of the NLC. The rationale behind the need for endorsement is for the tenancy exempt from registration to enjoy the same protection in law as provided in the NLC for all other dealings such as lease, charge and easement (See *Lee Nyan Hon Brother Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626.)

[135] Further, ss. 316-318 of the NLC set out the application for endorsement of tenancy exempt from registration, the application procedure and the cancellation thereof. It is inconceivable and impractical for the defendants to endorse a short stay by the guests on the register document of title and cancel the same everytime guests register for the rental and upon departure. It is unthinkable that these endorsement regimes would have to be repeated over and over again each time a guest came in and depart for the short term rental of the parcel units.

[136] Tenancy exempts from registration as found in the NLC is not intended to cover short term stay such as the one operated by the defendants where the nature of the stay is merely temporal and transient, which the House Rules was specifically enacted to prohibit.

[137] Therefore, we are of the view that the word "lease" in s. 70(5)(a) of the SMA 2013 is distinct from a bare license, as the licensor in such arrangement retains the immediate right to oust the licensee and no legal or equitable interest vests by nature of the license. Support for this proposition can be found in the judgment of Lord Denning MR in the Court of Appeal case of *Marchant v. Charters* [1977] 3 AER 918, at p. 922 where he propounded the test of whether short term occupancies could be construed as licenses rather than leases when he said that the test:

> … does not depend on whether he or she has exclusive possession or not. It does not depend on whether the room is furnished or not. It does not depend on whether the occupation is permanent or temporary. It does not depend on the label which the parties put on it. All these factors which may influence the decision but none of them is conclusive. All the circumstances have to be worked out. Eventually the answer depends on the nature and quality of the occupancy. Was it intended that the occupier

A should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not, in which case he is a licensee?

… Mr. Charters was not a tenant … He was only a licensee. A contractual licensee no doubt, but still a licensee. So he does not have a security of
B tenure under the Rent Acts. He is not protected against eviction …

[138] Applying the test as stated by Lord Denning as aforesaid, surely the owner of the parcel unit in Verve Suites in granting the short term rental or stay, never intend to grant a legal or equitable interest to the "guests" in the short term arrangement which by its very nature are merely transient lodgers
C for a specified consideration. One cannot say that a "guest" intends to obtain something more than a personal interest in the parcel unit during or after the booking for the stay with the owner done through various platforms *via* the internet. There is no security of tenure in the sense that he can be evicted if he overstays.

D **[139]** The defendants' reliance on *Tjia Swan Nio v. Ng Nyuk Moi & Ors* [1992] 4 CLJ 2200; [1992] 3 CLJ (Rep) 713 which referred to Lord Templeman's speech in the case of *Street v. Mountford* [1985] 1 AC suggests that "to constitute a tenancy the occupier must be granted exclusive possession for a fixed period or periodic term certain in consideration of a premium or
E periodical payments". We do not see how that case can be applied in our present case as there is no fixed term nor exclusive possession of the unit parcels as the defendants are in the business of short term rentals where there is no permanency in occupation by the guests. The fact that the short term rentals are only for a duration of days or even weeks negatived the
F presumption of any form of tenancy.

[140] The temporal nature of the stay by the "guests" in short term rentals arrangement can neither be regarded as a "lease" as opposed to a permanent and visible use of the parcel unit that s. 70(5)(a) of SMA 2013 intended to protect. From the terms and conditions of such services offered by various
G platforms via the internet, the terms state as follows:

8.2.1: You understand that a confirmed booking of an Accommodation (Accommodation Booking) is a limited license granted to you by the Host to enter, occupy and use the Accommodation for the duration of your stay, during which time the Host (only where and to the extent permitted
H by applicable law) retains the right to re-enter the Accommodation, in accordance with your arrangement with the Host.

The terms indicate that the short term rentals/stays only grant a limited licence of stay to the parcel units, and the occupant will never acquire an interest in the rented premises where they choose to lodge from their internet
I platform. The holding by the learned High Court Judge on the issue could not be described as solely based upon the terms and conditions stipulated by the service provider. The decision of the learned High Court Judge has been broadly explained when Her Ladyship said that there can never be a landlord

and tenant relationship in short term rental meant for a brief/short stay between parties contracting online. The terms and conditions of such services offered by the various platforms via the internet as indicated are sufficient to determine the temporal nature of the arrangement, without the need to go for a full trial, as contended by the defendants.

[141] The learned High Court Judge was not wrong when Her Ladyship referred to the terms in the Airbnb and found that guests of short term rentals seeking to book accommodation on the various internet platforms such as Airbnb are mere licensee requiring the unit for a temporary stay and could not be taken to mean dealing with the unit which falls within the prohibition under s. 70(5)(a) of the SMA 2013. Therefore, going by the meaning of the word "dealing" and "lease" in s. 70(5)(a) of the SMA 2013 and that short term rentals are in the nature of temporary occupation, we agreed with the submission by the plaintiff and the findings by the learned High Court Judge that House Rule No. 3 does not come within the realm of "lease" or "dealing" as found in s. 70(5)(a) of Act 757. The SMA 2013 only seeks to prohibit the creation of by-laws which restricts the alienation of land and the right of assignment which are inherent character of freehold ownership.

[142] Therefore, to be in consonant with the intention of Parliament in promulgating s. 70(5)(a) of the SMA 2013 read together with s. 34(1)(a) of the STA 1985 and the NLC, we agreed with the learned High Court Judge that the answer to the question as posed by the parties in the application, to be in the negative.

[143] In coming to the conclusion that the House Rule No. 3 enacted by the MC in prohibiting the short term rentals does not violate s. 70(5)(a) of the 757 Act, we are also guided by the decisions from case laws from other Commonwealth jurisdictions.

[144] Australia's law on strata titles had its genesis in New South Wales in 1961 whereby s. 13(3) of the Conveyancing (Strata Titles) Act 1961 provides:

> No by-law of addition to or amendment or repeal of any By-Law shall be capable of operating to prohibit or restrict the devolution of a lot or any transfer, lease, mortgage, or other dealing …

[145] In 1990, Young J in *Hamlena Pty Ltd v. Sydney Endoscopy Centre Pty Ltd* [1990] 5 BPR 11, had the occasion to peruse the said Act in s. 58(6) which is similar to the present New South Wales's Strata Schemes Management Act 2015 when he said:

> S. 58(6) prevents a by-law being made which would restrict the devolution of a lot. This subsection seems to me to envisage the possibility that were it not for its existence, there would be power within s. 58 to pass a by-law limiting the right to assign a lot.

A In *Hamlena Pty Ltd* (*supra*), the construction given by the learned High Court Judge on the word "devolution of a lot" imply an assignment altogether of the parcel lot which effectively resulted in the change of proprietorship.

[146] The position in law in Australia as to whether short term rentals violate its s. 139(2) of the Strata Schemes Management Act 2015, is rather B uncertain and fluid and it depends on which part of Australia that is being referred to.

Section 13(3) Conveyancing (Strata Titles) Act 1961 was reproduced in subsequent strata law amendments until 2015 where the same was reproduced in s. 139(2) of the Strata Schemes Management Act 2015. C

[147] There are many decisions of the New South Wales Civil and Administrative Tribunal (NCAT) which ruled that the by-laws prohibiting short term rentals were invalid. One such case is *Eastens v. Owners Corporation SP 1825* [2017] NSWCATCD 25. The decision by the NCAT in *Eastens* D (*supra*) and many others relied heavily upon the rulings and directives in NSW Fair Trading and the 2016 NSW Legislative Committee Environmental Planning Report.

[148] However, in Western Australia, the rulings by the first instance at the State Administrative Tribunal (the SAT), the appeal to the Supreme Court E of Western Australia, and the most recent ruling of the Supreme Court of Appeal took a different turn from *Eastens* (*supra*) in the Court of Appeal case of Australia in *Byrne v. The Owners of Ceresa River Apartments Strata Plan* [2017] QASCA 104; [2016] WASC 153; [2017] WASCA 104. In *Byrne* (*supra*), the owner of an apartment obtained planning approval from the F Council to allow their apartment to be used for short term accommodation. By-law 16 of the building allows a lot to be used by proprietors as a "residence" or granted "occupancy rights" to "residential tenants" only. Several of the owners used an online letting site to source for short stay occupiers. The strata company applied to the SAT for an order that the short term rentals were contrary to by-law 16. The SAT found that: G

(i) "Residence" refers to intent with which a lot is to be occupied, rather than the name put to it (namely, residential versus commercial or industrial);

(ii) "Residence" and "residential" require the demonstration of an intent to H reside permanently or for a substantial period, to call the place home or to have the place as a fixed address and the words "residential tenant" should reflect that same interpretation; and

(iii) Short stay occupiers demonstrate none of these intentions.

I **[149]** The SAT in *Byrne* (*supra*) ordered the owners not to use their lots for short stay rentals. The Court of Appeal held that the by-laws were valid as there was no restriction on the owner's right to grant a lease, as the restriction was only on the use of the apartment.

Mr. Byrne, an unsuccessful owner appealed to the Supreme Court, which was dismissed. The Supreme Court agreed with the findings of the SAT that the words "residence" and "resident" refer "to an occupant who demonstrates an intention to reside at the lot for a substantial period or makes the lot a permanent place of abode." Likewise Mr. Byrne's appeal to the Supreme Court of Appeal was also dismissed.

[150] The NCAT ruling in *Eastens* (*supra*) has been heavily criticised as it lacked sufficient reasoning behind its decision. The by-law was not reproduced and the reasoning was brief as it only referred to an NSW Fair Trading publication from November 2016. NCAT's reasons did not refer to the Local Environmental Plan (LEP) in Woolhara, which bans short term accommodation without prior consent from the Council. An LEP will override any strata by-law. The NCAT in *Eastens* (*supra*) also failed to refer to *Byrne* (*supra*) that allowed by-laws to prohibit short term rentals.

[151] In *Swan v. Uecker and Another* (*supra*) which was relied on by the defendants in our case, the applicant/landlord owned an apartment in Victoria which was leased to the respondents. The tenants listed the apartment on Airbnb as being available for short term stays, minimum was for three nights and maximum five nights. The landlord sought for an order for possession in the Victorian Civil and Administrative Tribunal premised on the basis that cl. 54 of the lease prohibited sub-letting of the apartment without written authorisation from the landlord, hence the tenant had breached the same. The tribunal found that:

(i) The Airbnb guests did not have exclusive possession of the premises, as they could not eject all others including the tenants;

(ii) The express words used in the Airbnb agreement referred to the use of the premises by guests as a licence;

(iii) The short term stays by the guests, the use of the payment platform, the terms of arrival and departure and the terms of the use of the premises;

(iv) The tenants' retention of the premises as their principal residence before, during and after each of the Airbnb guests; and

(v) The ability of the tenants to access the premises during each Airbnb stay and make a guest who overstayed leave the property.

The application by the landlord was dismissed by the tribunal on the basis that the tenants had only granted the Airbnb guests licences to occupy, not leases.

Consequently the tribunal found that the tenants had not sub-let the apartment and ordered that the landlord's application for a possession order be struck out.

A The landlord appealed against the decision of the tribunal and Croft J held in favour of the landlord stating that the Airbnb agreement was a lease and that the apartment had been sublet without the prior permission of the landlord. Possession order was granted to the landlord. Croft J also noted that "the tenants by means of the Airbnb agreement, effectively and
B practically passed that occupation, with all its qualities, to their Airbnb guests for the agreed period under the Airbnb agreement".

[152] What needs to be observed and taken note of in *Swan v. Uecker and Another* (*supra*), is that, although the findings of the court that the Airbnb agreement was a lease rather than a mere license to occupy, the court therein
C confined the application of the decision to the facts of the particular case, when the learned judge also noted that "this is not a case on the merits of the Airbnb arrangements." Hence, we find that the case is of limited application.

[153] The divergence in decisions on point in the various jurisdiction that
D followed the NSW's model as aforesaid, came to be decided in the Privy Council case of *O'Connors (Senior) & Ors v. The Proprietors, Strata Plan No 51* [2017] UKPC 45. This case originated from the Court of Appeal of the Turks and Caicos Islands where in 1971 the islands based their strata law on the entire New South Wales Conveyancing (Strata Titles) Act 1961, known as
E the Turks and Caicos Islands Strata Titles Ordinance (STO). Hence there is direct parallels with the position in that jurisdiction. Section 20(4) of the STO contained a prohibition on making of strata by-laws affecting the right of owner to lease the apartment in the development known as "The Pinnacle" which reads.

F > No by-law shall operate to prohibit or restrict the devolution of strata lots or any transfer, lease, mortgage, or other dealing therewith or to destroy or modify any easement implied or created by this Ordinance.

The material by-law provides as follows:

G > 7.1 Each proprietor shall:
>
> 9. Not use or permit his Residential Strata Lot to be used other than as a private residence of the Proprietor or for accommodation of the Proprietor's guests and visitors. *Notwithstanding the foregoing, the Proprietor may rent out his Residential Strata Lot from time to time provided that in no event shall any individual rental be for a period of less than one*
H *(1) month.*
>
> …
>
> 16. Not use or permit to be used the Strata Lot or any part thereof for any illegal or immoral purpose, nor for the carrying on of any trade or business other than periodic renting or leasing of the Strata Lot
I in accordance with these by-laws unless such trade or business activity has been approved in advance by the Executive Committee in writing, which approval may be revoked for cause.

The central issue of the case turns on the construction of the words underscored.

The appellants own a unit at "The Pinnacle". They let their unit to be occupied by paying holidaymakers on weekly basis for periods of less than one month at a time, which led to the respondent seeking for an injunction to restrain such use, contending that there has been a contravention of by-law 7.1.9. The appellants defended the claim premised on the argument that the by-law was of no effect, as allegedly it is contrary to s. 20(4) of the Ordinance.

The trial judge found in favour of the unit owners while the TCI Court of Appeal reversed the decision and granted the injunction which was sought by the respondents. The case then went on appeal to the Privy Council.

At the Privy Council, the appeal was dismissed and the Privy Council held that by-law 7.1.9 is valid and it is a legitimate restriction on the use of residential strata lots and it does not involve an impermissible restriction on leasing contrary to s. 20(4) of the Ordinance. In accepting the respondent's submission, the Privy Council held that:

(i) Statutes (such as the Ordinance) prohibiting restrictions on dealing in strata lots do not prevent restrictions on the uses of the lots, even though such restrictions may inevitably restrict the potential market for the lots.

(ii) By-laws are to be construed benevolently, having regard to their purpose in assisting the good management of the development for the benefit of its residents overall, and with a view if possible to prevent inconsistency with the governing laws. They are to be accorded a degree of respect and deference by the courts.

(iii) It is noteworthy that by-law 7.1.9 applies, and is expressed to apply, to a "residential strata lot", namely a lot "intended for use as a residence".

(iv) A by-law designed to restrict use to residential use is in principle unobjectionable.

(v) The first sentence of by-law 7.1.9 is very tightly drawn since it restricts the use of any lot; essentially, it prohibits commercial exploitation of the residential units.

(vi) Properly construed, the second sentence of by-law 7.1.9 is not a restriction, but rather, a relaxation of what has gone before; it provides a measure of relief by allowing residential use by others, including exploitation or rental by third parties, provided always that any letting is for at least one month.

(vii) Following the approach in *Caradon District Council v. Paton* [2001] 33 HLR 34, short term use by transient holiday makers is different in character from long term residential use. There is a qualitative difference. A person in a holiday property for a week or two is not using the same as his home or residence; such use lacks a degree of permanence.

(viii) The temporal requirement in by-law 7.1.9 is justifiable because it is part and parcel of an attempt to limit the use of the lot to that of a residence; it seeks to ensure the degree of stability in occupation required to preserve residential use.

(ix) All in all, by-law does not prohibit letting; it prohibits use other than as a residence.

[154] The decision in *O'Connors (Senior) & Ors* (*supra*) traces the legislative intent on the prohibitions and the restrictions which formed the pivotal dispute in the appeal before the Privy Council. Likewise in our present appeal. The Privy Council traces the reasons behind the enactment of s. 20(4) of the STO that is similar to the New South Wales's Conveyancing (Strata Titles) Act 1961, which to some extent is similar to our s. 70(5)(a) of the SMA 2013.

[155] The intent of Parliament in enacting s. 70(5)(a) of the SMA 2013 is purely to maintain the marketability of the units in strata living and not to restrict the ability of parcel owners to transfer or assign the same for financing proposal. From the reading of House Rule No. 3, there is nothing in it that restricts or prohibits the right of parcel owners to deal with their ownership including transfer and/or assignment of the parcel units.

[156] *O'Connors (Senior) & Ors* (*supra*) had referred to *Byrne* (*supra*) with approval which supports the contention of the plaintiff that the correct law with regard to whether strata schemes in Australia could adopt by-laws prohibiting short term rentals. We agreed with the submission of the plaintiff that the decision of the Privy Council in *Byrne* (*supra*) has brought certainty to the law with regard to whether by-laws preventing short term rentals could be enacted by Owner Corporation in Australia. The Privy Council held that the appeal before them turned on the construction of the relevant by-laws. *O'Connors (Senior) & Ors* (*supra*) held that the construction must be done benevolently taking into account their purpose in assisting the good management of the development for the benefit of its residence as a whole, and with a view if possible to avoiding inconsistency with the governing statute.

[157] The Board approved the decision of the English Court of Appeal in *Caradon District Council* (*supra*), when it went on to consider whether a covenant requiring a house not to be used other than as a private dwelling was breached when the occupant used the same for short period. The Board referred to that part of the decision of Latham LJJ which stated:

> Both in the ordinary use of the word and in its context, it seems to me that a person who is in a holiday property for a week or two would not describe that as his or her home. It seems to me that what is required in order to amount to use of a property as a home is a degree of permanence, together with the intention that should be a home, *albeit* for a relatively short period, but not for the purposes of a holiday.

[158] The decision of the Privy Council is highly persuasive and our apex court has repeatedly applied the decisions of the Privy Council in our local cases (Refer to *Gin Poh Holdings Sdn Bhd v. The Government of the State of Penang and Ors* [2018] 4 CLJ 1; *Pembinaan Lagenda Unggul Sdn Bhd v. Geohan Sdn Bhd & Another Appeal* [2018] 1 LNS 172).

[159] Given the aforesaid, we are of the view that the decision of *Byrne* (*supra*) had finally disposed of the question of law, namely that the House Rule No. 3 had not violated s. 70(5)(a) of SMA 2013. Therefore the learned High Court Judge did not err in making such findings that House Rule No. 3 is an additional by-law within the meaning of s. 70(2), valid and enforceable and not in any way contrary to s. 70(5) of SMA 2013. Neither can it be said to be oppressive and unreasonable as submitted by the defendants.

[160] On the issue that the House Rule violates art. 13 of the Federal Constitution, the learned High Court Judge held that the House Rule does not in any way take away the defendants' proprietary rights and interest over the property as they continued to enjoy an uninterrupted ownership of the property. There has never been any deprivation of the defendants' right of ownership over their parcel units or property. So long as the House Rules are observed, the defendants have every right of enjoyment over their properties.

[161] It is the contention of the defendants that according to the land title of Verve Suites, it is a commercial building and is not a residential building (p. 683 CCB Jilid 4), hence the defendants' short term rental business is not illegal and does not contravene any existing law. This contention by the defendants is misconceived as the by-laws which are statutorily enacted in s. 70(2) in SMA 2013 read together with regs. 5 and 28 of the Strata Management (Maintenance and Management) Regulations 2015 are applicable to both residential and commercial units under the SMA 2013.

The Cross-Appeal

[162] This is with regards to the imposition of fine not exceeding RM200 against any proprietor, occupant or invitee who is in breach of any of the by-laws.

[163] Section 70(2)(i) of the SMA 2013 allows the imposition of a fine of RM200 for breach of any by-law. We take note of the concern by the plaintiff that such fine of RM200 for each breach regardless of the number of days the breach continues would create a situation where the parcel owner would

just factor in this amount into the rent for each breach. Hence such imposition of fine for each breach would not act as a deterrent to a would-be offender.

[164] However, s. 70(2)(i) of the SMA 2013 never provides for nor envisages an imposition of fine of RM200 for each day of continued infringement. If the current provision of the imposition of fine is considered to be inadequate and that a penalty of a fine for each day for each continuing breach of the by-law ought to be imposed, then the current law ought to be amended. So long as s. 70(2)(i) is worded the way it is now, the plaintiff cannot impose a daily fine for each day the breach continues. It is a trite principle of law that any imposition of penalty especially one that has a financial implication, be expressly provided for in the law.

[165] Therefore, for the plaintiff to impose a daily fine for each continuing breach, there must be an express provision stating as such. One example of such provision can be found in s. 34(3) of the SMA 2013 which states that:

> (3) Any purchaser or parcel owner who, without reasonable excuse, fails to comply with the notice referred to in subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both, and in the case of a continuing offence, **to a further fine not exceeding fifty ringgit for every day or part thereof during which the offence continues after conviction.** (emphasis added)

One cannot infer nor imply from s. 70(2)(i) of the SMA 2013 the power of the frequency to impose a fine, for every day the breach continues, in the absence of express provisions.

[166] Hence the MC is not authorised by s. 70(2)(i) of the SMA 2013 to impose a fine of RM200 for each day the infringement continues.

[167] The learned High Court Judge did not err when Her Ladyship held that a fine of RM200 can only be imposed for each infringement of the by-law and not for each day the infringement continues and any fine collected has to be deposited into the maintenance account. Her Ladyship had correctly struck down that part of the House Rule No. 3 of the plaintiff which imposed a daily fine of RM200 for each day the infringement continues against the defendants.

Conclusion

[168] Accordingly, the appeal by the defendants/appellants is dismissed with costs and the cross-appeal by the plaintiff/respondent is also dismissed with costs. The decision of the learned High Court Judge is affirmed.